

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DAVID GREENING,

Petitioner,

v.

MAGGIE MILLER-STOUT,

Respondent.

Case No. C06-5255RJB

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
June 23<sup>rd</sup>, 2006**

This habeas corpus action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636 (b)(1)(B) and Local Magistrates' Rules MJR 3 and MJR 4. Petitioner attempts to file this action as a "Writ of Habeas Corpus Ad Faciendum Et Recipiendum" (Dkt. # 1). Petitioner is challenging the jurisdiction of the Pierce County Superior Court where he was convicted after entering a guilty plea in 1997. The Pierce County cause number is 97-1-01540-7 and the Judge who accepted the plea and sentenced petitioner was Karen L. Strombom. (Dkt. # 1).

Petitioner plead guilty to assault in the second degree, burglary in the first degree, and theft in the first degree. Each count had a firearm enhancement. Petitioner alleges the state court lacked jurisdiction because the declaration for determination of probable cause does not establish "felonious conduct." (Dkt. # 1).

1 This is not Mr. Greening's first habeas corpus action challenging this conviction. In 2001 Mr.  
2 Greening filed Greening v. Morgan, 01-CV- 5511FDB. Review of the petition in that case shows  
3 Mr. Greening to be challenging the same conviction that he attempts to challenge in this case. (Dkt. #  
4 9, page 3 of 61 in 01-CV-5511FDB). In 2004 Mr. Greening filed Greening v Miller Stout, 04-CV-  
5 5421RBL. Review of that file discloses that again, Mr. Greening was challenging his 1997  
6 conviction under Pierce County cause number 97-1-01540-7. (Dkt. # 5, page 2 of 15 in 04-CV-  
7 5421RBL).

8 Thus, this is Mr. Greening's third attempt to file a petition challenging his 1997 Pierce  
9 County conviction. Accordingly this petition is successive.

10 This file should be administratively closed and the case transferred to the Ninth Circuit in  
11 accordance with Circuit Rule 22-3(a).

#### 12 DISCUSSION

13 Ninth Circuit Rule 22-3 (a) states:

- 14 (a) **Application.** Any petitioner seeking leave to file a second or successive 2254  
15 petition or 2255 motion in district court must seek leave under 28 U.S.C. §§  
16 2244 or 2255. An original and five copies of the application must be filed  
17 with the Clerk of the Court of Appeals. No filing fee is required. If a second  
or successive petition or motion, or application for leave to file such a petition  
or motion, is mistakenly submitted to the district court, **the district court**  
**shall refer it to the court of appeals.**

18 (Emphasis added).

19 Here, the petitioner is filing a successive petition. Clearly, the instant petition should be  
20 treated as a "second or successive" petition. The petition should be transferred.

#### 21 CONCLUSION

22 Based on the foregoing discussion, the Court should transfer this matter as a second or  
23 successive petition and administratively close the file. A proposed order accompanies this report and  
24 recommendation.

25 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
26 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.  
27 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
28

1 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
2 72(b), the clerk is directed to set the matter for consideration on **June 23<sup>rd</sup>, 2006**, as noted in the  
3 caption.

4 DATED this 26<sup>th</sup> day of May, 2006.

5  
6 /s/ J. Kelley Arnold  
7 J. Kelley Arnold  
8 United States Magistrate Judge  
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